STATE OF MICHIGAN

COURT OF APPEALS

ALPINE BUILDERS, INC.,

Plaintiff-Appellee,

v

BRIAN LANFEAR,

Defendant-Appellant.

UNPUBLISHED
February 1, 2007

No. 265015
Oakland Circuit Court
LC No. 2003-052542-CK

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court order confirming an arbitration award of $71,311.89 in favor of plaintiff. We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

We review de novo issues regarding an order to enforce, modify, or vacate an arbitration award. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004).

Defendant argues that he is entitled to relief under MCR 3.602(J)(1)(c) because the arbitrator rendered an award without making findings of fact. MCR 3.602(J)(1)(c) provides that an arbitration award may be set aside if the arbitrator exceeds his or her authority. "Arbitrators exceed their power when they 'act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law.'" *Saveski*, *supra* at 554, quoting *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982).

The law does not require a record of findings and supporting law. *DAIIE*, *supra* at 428; *Saveski*, *supra* at 555-556. We reject defendant's claim that the arbitration agreement required the arbitrator to issue findings of fact in support of the award. A fundamental tenant of contract law is that an unambiguous contract must be enforced as written. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). Ambiguity will be found in a contract where its words may reasonably be understood in different ways, or where there is an irreconcilable conflict between its provisions. *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006).

Here, the arbitration agreement is not ambiguous. Although paragraph 4 *contemplates the possibility* of findings of facts and requires that any findings be considered part of the record, it *does not require* that the arbitrator include such findings in the award. Paragraph 8 of the

arbitration agreement only requires the arbitrator to "issue an Arbitrator Decision/Award in writing." Therefore, the arbitrator did not violate the terms of the agreement by issuing an award of $71,311.89 in favor of plaintiff without including findings of fact explaining how he determined the award.

We also reject defendant's claim that appellate relief is warranted under MCR 3.602(J)(1)(b) because the arbitrator engaged in misconduct. Because defendant's challenge to the arbitration award is based on facts not appearing of record, it was incumbent on defendant to offer support for his argument that the arbitrator made improper ex parte communications with the parties that justified vacating the award. See MCR 2.119(E)(2).

Ex parte communications regarding a matter in litigation may take on different forms. See, e.g., *People v France*, 436 Mich 138, 163; 461 NW2d 621 (1990) (discussing substantive, administrative, and housekeeping communications between a judge and a deliberating jury and the different standards of prejudice applied to the communications). While there are circumstances in which prejudice might be presumed from an arbitrator's improper communication or ex parte contact with a party, *Hewitt v Village of Reed City*, 124 Mich 6; 82 NW 616 (1900), we conclude that defendant failed to offer evidence of improper communications to support such a presumption here.

Below, defendant offered only speculation to support his position that ex parte communications were made between plaintiff and the arbitrator. Further, defendant established nothing about the arbitrator's alleged contact with his counsel, for purposes of retaining him as an expert in other cases, to justify setting aside the arbitration award under MCR 3.602(J)(1)(b). The only specific offer of proof made by defendant is reflected in his affidavit, which was inadequate to warrant vacating the arbitration award.

It is unclear from defendant's affidavit whether his alleged communication with the arbitrator about his invoices occurred before of after the arbitration award was issued. In any event, because this alleged communication is administrative in nature, and no actual prejudice was shown, relief pursuant to MCR 3.602(J)(1)(b) is not warranted, even assuming that the communication was improper. As noted in *Lefkovitz v Wagner*, 395 F3d 773, 780 (CA 7, 1995), "[i]f the arbitrator's knowledge that his fee is being challenged precludes enforcement of his award, then anyone who sees that the case is going badly can scuttle the arbitration just by disputing the arbitrator's fee."

Defendant's affidavit also indicates that he had ex parte communications with the arbitrator during the inspection of the residence. Unlike *Hewitt*, *supra*, where there was evidence that the arbitrator received substantive, legal authority from a party contrary to the parties' stipulation, there was no proffered evidence in this case that the arbitrator acted outside the arbitration agreement by inspecting the residence. To the contrary, it is clear from paragraph 8 of the arbitration agreement that the parties contemplated that the arbitrator would inspect the residence before issuing an arbitration award. We deem defendant's failure to offer evidence that he objected to the arbitrator's inspection procedure to be evidence that he acquiesced to the arbitrator inspecting the residence in his presence. Because we are presented with no evidence that defendant in fact objected to the inspection of the residence in his presence, we will not now permit defendant to attack the award on the ground that he was present during the inspection process. A party may not harbor error, to which he or she has contributed by design or even

negligence, as an appellate parachute. *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005); *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997).

Under the present circumstances, because defendant has failed to offer evidence of any substantive communication that he made to the arbitrator that caused either actual prejudice or supports a presumption of prejudice to his own rights, we affirm the trial court's confirmation of the arbitration award.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper